No. 18-11479

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs-Appellees,

v.

DAVID BERNHARDT, Acting Secretary, U.S. Department of the Interior;; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants,

CHEROKEE NATION; ONEIDA NATION; QUINALT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, No. 4:17-cv-00868-O

AMENDED BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case.

Amici
Senator Tom Udall
Senator Lisa Murkowski
Senator Dan Sullivan
Representative Don Bacon
Representative Karen Bass
Representative Tom Cole
Representative Betty McCollum
Representative Don Young

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INTEREST OF AMICI CURIAE[1]

Amici curiae Senators Tom Udall, Lisa Murkowski, and Dan Sullivan, and Representatives Don Bacon, Karen Bass, Tom Cole, Betty McCollum, and Don Young are bipartisan Members of the United States Senate and the United States House of Representatives with a significant interest in Indian affairs and adoption and foster care. Specifically, Senators Udall and Murkowski are the current and former vice-chairs, respectively, of the Senate Committee on Indian Affairs; Representatives Bass and Bacon are co-chairs of the House Congressional Caucus on Foster Youth; and Representatives Cole, McCollum, and Young are all members of the House Congressional Native American Caucus, with Representatives Cole and McCollum servings as co-chairs and Representative Young servicing as a vice-chair. These amici are committed to addressing the challenges facing foster youth and protecting the right to tribal self-governance. Amici also have a significant interest in ensuring that their plenary authority to legislate for the benefit of Indians and Indian tribes pursuant to Article I, Section 8, Clause 3 of the U.S. Constitution is not unduly constrained. Here, the district court wrongly imposed limits on that authority—limits that are found nowhere in the

[1] No counsel for a party authored this brief in whole or in part, and no one other than amici or their counsel made any monetary contribution toward the brief's preparation or submission. All parties to this appeal consented to the original amicus brief; the State Plaintiffs, Individual Plaintiffs, and Tribal Defendants consent to this amended brief; the United States takes no position.

Constitution nor in decades of Supreme Court precedent. Accordingly, amici file this brief to set out the breadth of Congress's authority to legislate on Indian affairs, including in the area of adoptions and foster placement of Indian children, and explain why the Indian Child Welfare Act is an appropriate exercise of that authority and consistent with Congress's longstanding practice of regulating Indian affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an unprecedented decision, the district court struck down the Indian Child Welfare Act (ICWA or the Act) as inconsistent with the Fifth Amendment's guarantee of equal protection and the Tenth Amendment's anti-commandeering principle. That decision fails to respect Congress's broad power—and its obligation—to legislate for the benefit of Indian tribes. If affirmed, the district court's ruling would unduly constrain Congress's ability to fulfill that obligation, in contravention of the Founders' design, and would jeopardize the many important federal statutes and regulations enacted pursuant to Congress's constitutional prerogative and responsibility in the area of Indian affairs.

The United States has a unique trust responsibility to Indians. *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). With that responsibility comes broad authority to legislate for the benefit of *all* Indians, including to preserve tribal sovereignty and self-governance. *See Morton v. Mancari*, 417 U.S. 535, 555

(1974) ("As long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

The district court wrongly held key provisions of ICWA unconstitutional on equal protection grounds, focusing on three aspects of the statute that the court concluded exhibited racial bias. Specifically, the court found that ICWA's placement preferences are racially discriminatory because (1) they are triggered not only by a child's membership in a tribe but also by the child's eligibility for tribal membership; (2) they apply to Indian children and families who do not live on or near an Indian reservation; and (3) they favor all Indians, regardless of tribal affiliation, in making adoptive placements. The district court's analysis finds no support in the Constitution or in decades of Supreme Court caselaw, which make clear that Congress has broad and exclusive authority to legislate for the benefit of Indians and that legislation like ICWA does not impermissibly discriminate on the basis of race. Indeed, the three allegedly discriminatory elements identified by the district court are commonplace features in legislation regulating Indian affairs. Should the district court's analysis prevail, much of that legislation would be in jeopardy and Congress's ability to fulfill its unique obligation to legislate for the benefit of Indians would be severely undermined.

The district court also erred in finding that ICWA commandeers state courts in violation of the Tenth Amendment. As an initial, and primary, matter, the Constitution explicitly grants Congress plenary and exclusive power to legislate on Indian affairs. Furthermore, ICWA does not conscript state legislatures or executive officers to enforce a federal scheme. Congress frequently requires state courts to abide by applicable federal law, consistent with the Supremacy Clause. ICWA does nothing more than that. Once again, the district court's analysis here threatens a wide swath of federal legislation in addition to ICWA.

Amici have a substantial interest in ensuring that Congress's plenary authority to legislate in the area of Indian affairs is not improperly constrained and that its ability to fulfill its responsibility to act for Indians' benefit is not impeded. ICWA is a valid exercise of that authority and responsibility. The district court's judgment should be reversed.

ARGUMENT

I. ICWA DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The district court identified three aspects of ICWA that it believed contravened the Fifth Amendment's equal protection guarantee: first, that ICWA's placement preferences are triggered by a child's eligibility for membership in a tribe even if the child is not actually a member; second, that ICWA applies to Indian children and families who do not live on or near an Indian reservation; and,

third, that ICWA creates a placement preference for all Indian families, regardless of tribal affiliation. These aspects of ICWA's scheme are permissible criteria for legislation, and fully consistent with equal protection. They are also commonplace in legislation concerning Indian affairs.

A. Congress May, And Routinely Does, Legislate On The Basis Of Tribal Affiliation

The district court erroneously concluded that ICWA is predicated upon race rather than tribal affiliation. As a result, it applied strict scrutiny and held that the Act's preference for Indians in adoption and foster-care placements is not narrowly tailored to a compelling government interest. In reaching this conclusion, the court pointed specifically to the Act's definition of "Indian child," finding that it includes "those children simply *eligible* for membership who have a biological Indian parent." ROA.18-11479.4032. But ICWA does not apply to all children with a "biological Indian parent." It applies only to children with a biological parent *who is "a member of an Indian tribe*." *See* 25 U.S.C. § 1903(4) (emphasis added); *see also Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (holding that ICWA did not cover a child of Indian descent who was eligible for membership but whose parents were not tribal members because "the final draft of the statute limited membership for those children who were *eligible* for membership because they had a parent who is a member"). ICWA's application is therefore tied to the parent's tribal membership. And preferences based on tribal

membership are "political rather than racial in nature," subject only to rational-basis review. *Morton v. Mancari*, 417 U.S. 535, 553 n.24, 555 (1974). The Act's definition of "Indian child" easily satisfies that deferential standard.

That ICWA also applies to children who are not tribal members, based on the membership of their parents, does not change this. The reach of Indian law has always involved some consideration of lineage. Because the federal government's special trust relationship to Indian tribes derives from their status as sovereigns predating the formation of the United States, receiving the benefits of that relationship today necessarily requires a showing of ties to those ancestral communities. *See* Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 Stan. L. Rev. 491, 496 (2017) ("[T]ribes (as collectives) must trace their heritage to peoples who preceded European/American settlement in order to establish a political relationship with the federal government. Tribes, in order to be recognized as such under the Constitution, therefore must, as an initial definitional matter consist of people tied together by something akin to lineage."). In short, Indian ancestry is inextricably linked with tribal membership and Indian sovereignty. Accordingly, Congress has long considered ancestry as a relevant component when adopting legislation for the benefit of Indians as a sovereign group. *See, e.g.*, *Mancari*, 417 U.S. at 553 n.24 (upholding constitutionality of employment preference for Indians that applied to individuals

who were members of federally recognized Indian tribes *and* "one-fourth or more degree Indian blood"). Because such considerations of ancestry are anchored in the Constitution, strict scrutiny should not apply.

ICWA is far from the only example of federal legislation that reaches the children of tribal members. Consistent with its broad mandate to legislate for the benefit of all Indians, Congress has enacted a number of other statutory provisions that aim to provide benefits to children of tribal members even if the children are not themselves enrolled. For example, one component of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §§ 1601 *et seq.*, which supports Indians entering the health-care profession, includes anyone "who is a descendant, in the first or second degree" of a tribal member. *See id.* §§ 1603(13)(A), 1612, 1613. Congress similarly provides benefits to the children of tribal members in the Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(7)(B) (providing benefits to the "biological child of a member of an Indian tribe"), the Tribally Controlled Grant School Endowment Program, 25 U.S.C. § 2511(3) (providing benefits to the child or grandchild of a tribal member or one eligible for membership), as well as in the provision of education grants to Indian communities, 20 U.S.C. § 7491(3)(B) (defining "Indian" to include "a descendant, in the first or second degree" of a tribal member). Even more directly, the Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201 *et seq.*,

which aims to protect Indian children from abuse, incorporates ICWA's definition of "Indian child." *Id.* § 3202(7). Like ICWA, that statute was enacted in furtherance of the United States' "direct interest, as trustee, in protecting Indian children," and in recognition of the importance of Indian children "to the continued existence and integrity of Indian tribes." *Id.* § 3201(a)(1)(F). Should the district court's logic prevail, these and other longstanding examples of Congress's exercise of power in connection with Indian affairs would be similarly suspect.

Congress's choice to reach the children of tribal members through ICWA and these other statutes was a deliberate one, and one that is rationally related to "the fulfillment of Congress's unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. Congress enacted ICWA not only to protect Indian children from the trauma of unwarranted dislocation, but also to protect Indian tribes from the removal of their children, which further imperiled tribes' already threatened identities, their cultural heritage, and their very existence. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 (2013) ("The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes[.]"). As the Act states, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). And to protect tribal interests, ICWA "recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." *Mississippi Band*

of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989) (quoting *In re Adoption of Holloway*, 732 P.2d 962, 969 (Utah 1986)).

In tying the application of ICWA to the tribal membership of a child's parents, Congress recognized that not all tribes automatically grant membership to children of tribal members. On this point, the House Report noted:

> Th[e] minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for [Indian children's] protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

See H.R. Rep. No. 95-1386, at 17 (1978). A statute that applied only to children who were already tribal members would impede tribes' inherent sovereign authority to determine their own memberships, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and would be at odds with the trust obligation to further tribal self-governance. *Mancari*, 417 U.S. at 555. In the end, Congress adopted a reasonable and rational standard that was intended to further that trust obligation. To conclude otherwise would risk undermining decades of congressional lawmaking in the area of Indian affairs.

B. Congress Routinely Legislates For The Benefit Of Indians Both On And Off Reservations

The district court mistakenly suggested that a preference for Indians, such as the one contained in ICWA, is constitutional only if applied to Indians living on or near a reservation. ROA.18-11479.4031. But Congress's authority to legislate with respect to Indian affairs is not and never has been limited to conduct "on or near" a reservation. To the contrary, Congress has broad authority to pass laws that are reasonably and rationally designed to further tribal self-governance, without regard to the location of the regulated conduct. *See, e.g.*, *Mancari*, 417 U.S. at 537-538, 555 (applying rational-basis review and holding that employment preference for Indians in the Bureau of Indian Affairs, which was not limited to employment on or near reservations, did not violate equal protection clause of Fifth Amendment). And ICWA is just one of many instances in which Congress has done exactly that.

Congress has routinely exercised its plenary power to adopt legislation for the benefit of Indians that applies with equal force both on and off reservations. For example, the IHCIA, which Congress passed "in fulfillment of its special trust responsibilities and legal obligations to Indians," 25 U.S.C. § 1602, provides for comprehensive health services for Indians regardless of their location. Indeed, an entire subchapter of the IHCIA is devoted to "urban Indians"—i.e., Indians living *off*-reservation in urban centers. Likewise, provisions of the IHCIA aimed at

facilitating education and training in the health professions apply broadly to all Indians (including first- or second-generation descendants of tribal members), whether they live on or off a reservation. *See id.* §§ 1603(13)(A), 1612, 1613. And in yet other instances, Congress has defined the terms "[r]eservation" broadly to include "former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act." *Id.* § 1452(d); *see also* 18 U.S.C. § 1151 (defining "Indian country" to include "all dependent Indian communities within the borders of the United States" and "all Indian allotments, the Indian titles to which have not been extinguished").

Congress has explicitly extended the reach of a number of other laws to off-reservation Indians as well. For instance, the Head Start Act, 42 U.S.C. §§ 9801 *et seq.*, which is intended, *inter alia*, to "promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development," *id.* § 9831, authorizes the Secretary of Health and Human Services to designate Head Start agencies within communities, including communities of "Indians in any off-reservation area designated by an appropriate tribal government in consultation with the Secretary." *Id.* § 9836(h). Similarly, the Workforce Investment Act of 1998 provides that research grants may be used to conduct studies of "effective mechanisms for the delivery of rehabilitation services to Indians residing on *and*

off reservations." 29 U.S.C. § 764(b)(13) (emphasis added). Other statutes provide federal funds to Indian tribes and tribal members to be used both on and off reservation. *See, e.g.*, 25 U.S.C. § 1466 (setting up revolving fund to provide loans for tribes and tribal members, including for the purchase of land both on and off reservation).

These provisions are necessary because the vast majority of Indians—nearly 80%—do not live on reservations or other trust lands. *See* U.S. Department of Health and Human Services Office of Minority Health, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62 (visited Jan. 14, 2019). Congress cannot satisfy its trust obligation to Indians and Indian tribes if the laws it enacts for Indians' benefit do not extend to *all* Indians, regardless of their proximity to a reservation. Indeed, many such laws have as a key goal ensuring that Indians living on and off reservations have equal access to necessary services and benefits. For instance, one of Congress's purposes in passing the IHCIA was to eliminate the disparities that had developed between the provision of health services to Indians living on reservations and those living off reservations. *See, e.g.*, *Indian Health Care Improvement Act: Hearing on H.R. 2525 and Related Bills Before the Subcomm. on Indian Affairs of the H. Comm. on Interior and Insular Affairs*, 94th Cong. 29 (1975) (statement of Rep. Lloyd Meeds, Chairman of Subcomm. on Indian Affairs) (explaining that the Act "attempt[s] to alleviate [certain] problems"

with the provision of health services to Indians, including the exclusion of "urban Indian populations . . . from the services of Indian Health Service" despite their facing "many of the health problems faced by the Indians on Federal reservations"). And in a report accompanying the IHCIA, the Senate noted that "the same policies and programs which failed to provide the Indian with an improved life style on the reservation have also failed to provide him with the vital skills necessary to succeed in the cities." S. Rep. No. 94-133, at 138 (1975).

Both this Court and the Supreme Court have upheld statutes that grant benefits or preferences to Indians living both on and off reservations. The Supreme Court in *Mancari* resoundingly affirmed Congress's authority to adopt a statutory preference for Indians that applies regardless of proximity to a reservation. The district court incorrectly stated that the preference at issue in *Mancari* applied only to Indians living on or near reservations. In fact, the BIA employment preferences are not so limited: They provide that "qualified Indians" shall have "preference to appointment to vacancies in *any*" positions maintained by the BIA, not just those on or near a reservation. *Mancari*, 417 U.S. at 538 (quoting 25 U.S.C. § 5116 (emphasis added)). Moreover, the Indian Reorganization Act, which adopted the BIA employment preference, defines the term "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe," regardless of whether they live on or near a reservation. 25 U.S.C. § 5129.

Relying on *Mancari*, this Court has upheld a statute granting a statutory exemption to all Indians without regard to proximity to a reservation. In *Peyote Way Church of God*, this Court held that a provision exempting members of the Native American Church of North America (NAC) from the Controlled Substances Act's prohibition on the use of peyote, was constitutional in part because the exemption was "limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991). The exemption was not limited to members living on or near a reservation. Indeed, this Circuit noted that the constitutionality of such legislation does not depend on proximity to a reservation. *Id.* at 1214 (noting that the Supreme Court in *Mancari* based its decision, in part, on "a line of cases in which the Court has upheld legislation preferentially treating Native Americans who are tribal members *or* live on or near a reservation" (emphasis added)).

To be sure, Congress has at times adopted laws that apply only to conduct that occurs "on or near" an Indian reservation (or within "Indian country") or ascribe a preference for Indians living on a reservation over those living off reservation. *See, e.g.*, 42 U.S.C. § 2000e-2(i) (exempting preferential employment of Indians by "any business or enterprise on or near an Indian reservation" from Civil Rights Act's prohibition on racial discrimination in employment); 25 U.S.C.

§ 1521 (establishing Indian Business Development Program to provide grants to "establish and expand profit-making Indian-owned economic enterprises on or near reservations"). But this results not from any limitation on Congress's plenary power to legislate with regard to Indian affairs, but rather from the simple fact that laws relating to tribal self-government will, in many cases, be targeted at conduct occurring on or near Indian reservations. *United States v. Mazurie*, 419 U.S. 544, 556-557 (1975) (holding that tribes retain independent authority even on fee lands owned by non-Indians located within the boundaries of their sovereign territories); *see also Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 441 (1989) (Stevens, J., opinion) (holding that an Indian tribe retained inherent authority to zone land held in fee by a non-member in a closed area of a reservation). However, the fact that Congress has occasionally passed legislation that is especially deferential to tribal sovereignty over conduct on a reservation does not mean that Congress's broad constitutional authority to legislate regarding Indian affairs is constrained in any way by reservation boundaries. To hold otherwise would dismantle not just the provisions of ICWA at issue here, but a host of critical social services designed by Congress to benefit all Indians, the great majority of whom live off reservations.

C. ICWA's Preference For "Other Indian Families" Is Consistent With Congress's Authority To Legislate For Indians Generally

The district court erred in concluding that ICWA's placement preference for other Indian families—which comes into play if a child cannot be placed with family members or other members of the child's tribe—renders ICWA unconstitutionally overbroad. ROA.18-11479.4035–36. That conclusion was mistaken for two reasons. First, in the context of legislation intended to benefit Indians, distinguishing generally between Indians and non-Indians does not "impermissibly[] treat 'all Indian tribes as an undifferentiated mass.'" ROA.18-11479.4035 (quoting *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring)).[2] To the contrary, virtually all of Indian law draws just such a distinction. Affirming the district court would therefore have consequences reaching far beyond this case, undermining much of Title 25 of the U.S. Code and frustrating Congress's ability to fulfill its unique obligation to Indians and Indian tribes. Second, although ICWA does not discriminate on the basis of race and

[2] Notably, the quoted language from Justice Thomas's concurrence in *Bryant* comes from his call for the Supreme Court to *change* its precedent regarding Congress's plenary power to legislate for the benefit of all Indians, rather than a description of existing law. *See Bryant*, 136 S. Ct. at 1968 (Thomas, J., concurring) ("It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty."). Whether Justice Thomas's call for change is prudent or not, it is not for the district court to reconsider settled Supreme Court precedent.

therefore should not be subjected to strict scrutiny, the preference for "other Indian families" is narrowly tailored to Congress's compelling interest in protecting Indian children.

1. Congress acts within its power in distinguishing between Indians and non-Indians in legislation intended to benefit Indians.

The district court concluded that any categorical distinction between Indians and non-Indians is impermissible. ROA.18-11479.4035. But that ignores settled law and two hundred years of congressional practice. In virtually all of Indian law—from employment preferences to criminal jurisdiction—Congress has long distinguished between Indians and non-Indians without regard to membership in a particular tribe. Allowing the district court's flawed reasoning to go uncorrected would undermine that settled law.

Employment preferences for Indians, which date back at least as far as 1834, *see Mancari*, 417 U.S. at 541, benefit all Indians as a class. For example, the Indian Reorganization Act of 1934 ("IRA") creates a preference for all "Indians" in filling "positions maintained . . . by the Indian Office, in the administration of functions or services affecting *any* Indian tribe." 25 U.S.C. § 5116 (emphasis added). Its "overriding purpose" was to foster "a greater degree of self-government, both politically and economically," among Indian tribes. *Mancari*, 417 U.S. at 542; *see also Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707,

716 (8th Cir. 1979) (describing IRA's purpose as establishing "Indian control of Indian services"). The IRA achieved that purpose without requiring any specific connection between the tribal membership of the person filling a particular position and the tribe or tribes served by that position. A member of one tribe living far from his or her tribal lands—either on non-reservation land or on the reservation of another tribe—could therefore benefit from the IRA's preference in applying for a position at a Bureau of Indian Affairs regional office serving tribes to which he or she did not belong.[3]

Similarly, Title VII's "Indian preference exemption" permits preferential treatment of Indians based on their status as Indians. It provides that:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual *because he is an Indian* living on or near a reservation.

42 U.S.C. § 2000e-2(i) (emphasis added). By its plain terms, the Indian preference exemption from Title VII permits any employer on or near a reservation to give preferential treatment to *any* Indian living on or near *any* reservation. It is not limited to just those Indians who are members of the tribe on whose reservation the

[3] Similarly, the Native American Housing Assistance and Self Determination Act of 1996 allows tribes to prefer not only their own members, but also members of other Indian tribes, in the provision of housing assistance. *See* 25 U.S.C. § 4131.

employer is located, nor is it limited to Indians living on that reservation. Rather, like the IRA, it grants a general preference to all Indians in "recognition of the longstanding federal policy of providing a unique legal status to Indians." *Mancari*, 417 U.S. at 548; *see also Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1122 (9th Cir. 1998) ("The purpose of the Indian Preferences exemption is to authorize an employer to grant preferences to *all* Indians (who live on or near a reservation)—to permit the favoring of Indians over *non*-Indians."). And that is for good reason. As noted above, only about 20 percent of Indians live on reservations or other trust lands. And of those, many are living on reservations of tribes of which they are not members; on some reservations, up to thirty percent of residents are non-member Indians. H.R. Rep. No. 102-61, at 4 (1991). If preferences like those in the IRA or Title VII had to be tribe-specific, as the district court's holding would require, a great many Indians would be left out entirely.

Similar distinctions between Indians, generally, and non-Indians exist in the criminal law. The Supreme Court has held that Indian tribes lack the authority to impose criminal penalties on non-Indians. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978) ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this

to be the necessary result of its repeated legislative actions."). But Indian tribes do have criminal jurisdiction over all other Indians, including non-member Indians. In 1991, in response to the Supreme Court's holding in *Duro v. Reina*, 495 U.S. 676 (1990), Congress amended the Indian Civil Rights Act to make clear that the Indian tribes' "powers of self-government" include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians." 25 U.S.C. § 1301(2) (emphasis added). This explicit recognition came after nearly two centuries of law distinguishing generally between Indians and non-Indians for purposes of criminal jurisdiction. In 1817, Congress extended federal criminal jurisdiction to crimes committed in Indian country, but excluded "any offence committed by one Indian against another." Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. This same exception was included in the Indian Trade and Intercourse Act of 1834, § 25, 4 Stat. 733, and the General Crimes Act, now codified at 18 U.S.C. § 1152 (1976 ed.). As recognized in the legislative history of the 1991 amendment, "Congress has never differentiated between member Indians and non-member Indians" in defining the scope of tribal criminal jurisdiction. S. Rep. No. 102-153, at 3 (1991).

As with the employment preferences discussed above, Congress had good reason to treat all Indians as a class. Given the large number of non-member Indians residing on reservations, the absence of tribal jurisdiction would create a

jurisdictional vacuum in which many misdemeanors committed on reservations could not be prosecuted at all. H.R. Rep. No. 102-61, at 3. As these examples illustrate, treating Indians generally as a class is often crucial to Congress's ability to fulfill its trust obligation to Indians.

2. The preference for "other Indian families" is narrowly tailored to serve ICWA's purpose of protecting the best interests of Indian children.

As discussed above, ICWA applies on the basis of tribal membership, not race, and therefore should not be subject to strict scrutiny.[4] But even if strict scrutiny did apply, ICWA is narrowly tailored to achieve a compelling governmental interest and thus satisfies that standard. The district court held that the preference for other Indian families rendered the Act overbroad because it "is not narrowly tailored to maintaining the Indian child's relationship with his tribe." ROA.18-11479.4035–36. But that is an overly narrow reading of the Act's purpose. ICWA was drafted to accomplish two goals: "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." H.R. Rep. No. 95-1386, at 8. The district court's analysis ignores the

[4] Furthermore, the preference for other Indian families is itself a political classification based on tribal membership and therefore does not independently trigger strict scrutiny. The Act defines "Indian" as "any person who is a member of an Indian tribe." 25 U.S.C. § 1903(3). "Indian" families, therefore, include only those families comprised of members of Indian tribes.

first purpose, and it is that purpose that is directly furthered by the preference for Indian families.

In the years leading up to ICWA, nearly a third of all Indian children were forcibly removed from their homes and placed in non-Indian families on the false assumption that "most Indian children would really be better off growing up non-Indian." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 1 (1977) (*1977 Hearing*) (statement of Sen. Abourezk); *see also Mississippi Band of Choctaw Indians*, 490 U.S. at 32-33. The consequences for the removed children were devastating. As one psychiatrist testified before Congress, removed children were deprived of their Indian identities but often were never fully accepted in or assimilated into their new, non-Indian communities. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 33 n.1 ("[T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." (quoting *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 46 (1974) (*1974 Hearings*) (statement of Dr. Joseph Westermeyer)). As a result, many children suffered from "ethnic confusion" and a "pervasive sense of abandonment." *1977 Hearing* 114 (statement of Drs. Carl Mindell and Alan Gurwitt). The preference for other Indian families helps to minimize the disruption and dislocation

experienced by removed Indian children by protecting and preserving their identity as Indians. *See* Uthe, *The Best Interests of Indian Children in Minnesota*, 17 Am. Indian L. Rev. 237, 246, 252 (1992) (describing significance of Indian cultural identity in well-being of Indian children and noting that placement of Indian children in Indian homes increased following ICWA).

Furthermore, the Act does not ignore the differences between tribes or treat them as "an undifferentiated mass." ROA.18-11479.4035. Rather, the Act provides that "[t]he standards to be applied in meeting [its] preference requirements . . . shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d). Accordingly, Indian communities are not treated as interchangeable equivalents; ICWA respects Indian tribes as culturally distinct communities, while recognizing that there will be not only more cultural stability within a single tribe, but also more commonalities between the "social and cultural standards" of at least some Indian tribes than between tribal and non-tribal communities. *See id.* § 1915(a), (b) (creating adoptive and foster care placement preferences for family members first, followed by other members of the Indian child's tribe and then other Indian families). Placement with an Indian family, selected in accordance with the social and cultural standards of the child's tribe, minimizes the

dislocation, marginalization, and loss of identity experienced by the removed Indian child. It is therefore crucial to ICWA's purpose of protecting the best interests of Indian children and to the fulfillment of Congress's "distinctive obligation of trust" in dealing with Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

II. ICWA DOES NOT VIOLATE THE TENTH AMENDMENT

The Tenth Amendment reflects the "truism" that powers not conferred upon Congress are retained by the states, while powers expressly delegated to Congress are not reserved to the states. *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)). Because the Indian Commerce Clause and the Treaty Clause expressly delegate to Congress the power to regulate Indian affairs, no such power is reserved to the states. *See United States v. Wheeler*, 435 U.S. 313, 319 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters"). Nonetheless, in drafting ICWA, Congress took care to respect the states' interests in overseeing matters of domestic relations, carefully balancing those interests with Congress's obligation to protect the sovereignty of Indian tribes and best interests of Indian children. It struck that balance not by commandeering state executive actors or legislatures, nor by "oust[ing] the States of their traditional jurisdiction over Indian children falling within their geographical limits," but by establishing "minimum Federal standards

and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." H.R. Rep. No. 95-1386, at 19. That is a constitutional exercise of Congress's plenary authority to regulate Indian affairs.

Prior to ICWA, jurisdictional, substantive, and procedural issues regarding whether and how to remove Indian children—and whether states or tribes were empowered to make those decisions—were often resolved to the detriment of tribes and their children. These culturally sensitive decisions were most often made by non-Indian authorities unfamiliar with Indian family structures and practices. *See Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Comm'n* 79 (Comm. Print 1976). The result was the widespread and unwarranted removal of Indian children, due not to abuse or neglect, but simply to cultural bias. *See* Graham, *Reparations and the Indian Child Welfare Act*, 25 Legal Stud. F. 619, 624-625 (2001). ICWA was largely intended as a response to that crisis. *See Adoptive Couple*, 570 U.S. at 649 ("[T]he primary mischief the ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts." (emphasis omitted)).

Congress's carefully considered solution was to preserve state-court jurisdiction in cases involving off-reservation Indian children, but to establish

"minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. During the process of drafting ICWA, Congress actively sought out the States' views, which were largely favorable. For example, a representative from Washington State praised the bill as "an enlightened and practical approach to legal jurisdiction and social services delivery to Indian people," *1977 Hearing* 342 (statement of Don Milligan), and expressly welcomed federal involvement as the only way to remedy the situation, *id.* at 356.[5]

The district court wrongly concluded that the balance ICWA struck between state-court jurisdiction and the establishment of federal standards violated the Tenth Amendment because it involved the application of federal standards to state-law causes of action. But, particularly in areas of Congress's plenary power, state rules and procedures cannot be allowed to interfere with the exercise of federal rights. *Cf. Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."). ICWA is, accordingly, not unique in its application of federal standards and procedural protections to state-law causes of action. *See, e.g., Freier*

[5] Additionally, when the Bureau of Indian Affairs proposed its 2016 Final Rule incorporating and clarifying various components of ICWA, the Texas Department of Family and Protective Services commented that it "fully supports the Indian Child Welfare Act" and is committed to "both the letter and spirit of the ICWA." ROA.18-11479.824.

v. Westinghouse Elec. Corp., 303 F.3d 176, 204 (2d Cir. 2002) (collecting cases and statutes). For example, the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. §§ 3901 *et seq.*, stays any civil proceeding—state or federal—in which the plaintiff or defendant is in active military service at the time of filing. *Id.* § 3932(a)(1). It also directs that time in military service may not be included in calculating any limitations period with respect to any state or federal claim, *id.* § 3936(a), and sets standards applicable to child custody determinations made with respect to children of servicemembers, *id.* § 3938. As with ICWA, the SCRA is intended to serve Congress's plenary power—in this case Congress's war power—by setting federal standards for certain categories of state-court proceedings that touch upon that power. *See id.* § 3902. Congress's authority in this regard is well-established and does not violate the Tenth Amendment. *See, e.g.*, *New York*, 505 U.S. at 178-179 (noting that "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause").

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 6,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief of amicus curiae complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 6th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 6, 2019.

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